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No. 90-1301

In The

Supreme Court of the United States

October Term, 1990

GEORGE HADGES,

Petitioner,

v.

YONKERS RACING CORPORATION,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Did Yonkers Racing Corporation, as the private owner of a harness racetrack licensed by New York State to conduct pari-mutuel wagering on harness racing, engage in state action for the purposes of 42 U.S.C. §1983 when it excluded petitioner from its racetrack?

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RESPONDENT'S BRIEF IN OPPOSITION

CONSTITUTIONAL AND STATUTORY PROVISIONS

New York Comp. Codes Rules and Regulations, Title 9, §4119.8 (1985):

> **4119.8 Undesirable persons.** Any person whether a licensee, participant or patron whose conduct is deemed detrimental to the best interest of harness racing or who is deemed an undesirable person may be expelled from the track. In this regard the track, on its own initiative, or upon request of the commission or its representatives, shall take immediate steps by whatever means are reasonably required to expel such

person. Acts deemed undesirable shall consist of, but not be limited by, the following:

(a) bookmaking or other illegal wagering or gambling;

(b) touting;

(c) creating or continuing a public disturbance;

(d) disorderly conduct;

(e) associating with undesirables;

(f) transmitting information to points outside the track;

(g) failure to appear when directed to do so by any official of the commission in furtherance of an investigation or hearing and to testify under oath concerning any facts within his knowledge and produce any books, records, written matter or other evidence within his possession or control relevant to such matter.

In addition a person who has been convicted of a crime involving moral turpitude, or who has been convicted of bookmaking or other form of illegal gambling, or who has been adjudged by any court, State commission, or other governing body guilty of any fraud in connection with racing, or any athletic contest shall be deemed an undesirable person and shall be subject to expulsion as provided in this section. Nothing contained in this section shall diminish the right of any track to exclude any person as a patron or otherwise without reason provided such exclusion is not based upon race, creed, color or national origin.

New York Comp. Code Rules and Regulations, Title 9, §4119.9 (1985):

> **Prohibited acts.** (a) No licensee of the New York State Harness Racing Commission or any other person shall commit any act or conspire to commit any act, which, though not specified in this Subchapter, constitutes conduct detrimental to the best interest of racing or is in its nature fraudulent or corrupt or injurious to the character of the turf. Any such act or attempt, or conspiracy shall constitute a violation of this Subchapter and shall subject the licensee or such other persons to the penalties prescribed herein.

STATEMENT OF THE CASE

Respondent Yonkers Racing Corporation ("YRC"), a closely held private corporation, owns and operates Yonkers Raceway located in Yonkers, New York. Yonkers Raceway is one of six privately owned and operated harness racetracks licensed to conduct pari-mutuel wagering on harness racing in the State of New York.[1] Since purchasing Yonkers Raceway in 1970, YRC has invested $65,000,000 in the racetrack.

Petitioner is a journeyman harness racehorse owner, trainer and driver of marginal ability who participated in harness racing at Yonkers Raceway from time to time

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[1] The New York State Racing and Wagering Board ("Racing Board") has jurisdiction over all horse racing activities in New York. N.Y. Rac. Pari-Mut. Wag. & Breed. Law §101 (McKinney 1984). Included within the Racing Board's powers is the ability to issue licenses to harness racetracks. *Id.* §307 (McKinney 1984 & Supp. 1990). The state license is for a one year term renewable annually. The other licensed harness racetracks in New York are Batavia Downs, Buffalo Raceway, Monticello Raceway, Saratoga Raceway and Vernon Downs.

between 1975 and January 5, 1989. He is one of hundreds of individuals who holds licenses from the state Racing Board to own, train and drive harness racehorses in New York State.[2]

Petitioner's license was suspended by the Racing Board on two separate occasions as a result of serious violations of applicable state racing regulations. First, in 1974 petitioner's original license was suspended and thereafter revoked based upon his fraudulent failure to disclose his prior criminal record on his original license application. Petitioner's initial application for reinstatement of his license was denied in 1975 but ultimately granted and restored in 1976.

Thereafter, based upon a racing incident on October 9, 1986, petitioner's license was again suspended for a period of six months (January 5 to July 5, 1989) for illegally passing wagering information concerning a race in which he was driving to a member of the public in violation of applicable state regulations.[3]

Specifically, after a hearing the Racing Board found that on October 9, 1986, immediately prior to the eighth race at Roosevelt Raceway, while driving the harness racehorse *DAZZLING G.T.*, petitioner signalled and passed wagering information to an individual standing alone

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[2] A harness race, as distinguished from a thoroughbred horse race, is a trotting or pacing race usually run at a distance of one mile. The horses are standardbred horses harnessed to sulkies, which are light, two wheeled carriages. A "driver" sits upon and directs the racehorse from the sulky.

[3] See Rule 4119.9(a) of the Administrative Rules of the Racing Board set forth at length, *supra*.

at the rail.[4] Petitioner was driving the number 2 horse in the race. As petitioner approached the starting gate to begin the race, he trailed far behind the other seven horses in the field and was overheard to call out to a patron standing alone near the rail to "get the 7", a signal to bet on the number 7 horse although petitioner was driving the number 2 horse. The number 7 horse ultimately won the race, as predicted by petitioner, while petitioner's own horse raced erratically, finishing out of the money.

Petitioner's license was reinstated by the state Racing Board in July, 1989 at which time he applied for racing and training privileges at Yonkers Raceway. YRC denied his application.[5]

At petitioner's request, YRC management officials met with petitioner to discuss the decision. Robert Galterio, YRC's general manager, advised petitioner that he was denied racing privileges because of management's serious questions concerning his integrity arising from the very troubling facts surrounding his October 9, 1986 state suspension.[6] Petitioner was advised that it was the

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[4] Unlike thoroughbred horse races which employ a fixed starting gate, harness races are started through the use of a "pace car" which slowly circles the track until the participant horses gradually assemble behind it in designated spots or "holes". The race commences when the pace car reaches the designated starting line, at which point it pulls away from the field and off the track.

[5] State officials from the Racing Board had no involvement whatsoever in YRC's decision.

[6] Petitioner was also advised that ongoing disruptive litigation with third parties over the ownership of certain horses was a factor in YRC's decision.

decision of YRC management that his participation in harness racing at Yonkers Raceway was not in the best interest of either Yonkers Raceway or harness racing in general. Approximately one week later petitioner was advised that he was permanently barred from the Raceway's premises.[7]

Since then, plaintiff has been free to apply for privileges to drive and train harness racehorses at the five remaining New York State licensed harness racetracks, as well as the Meadowlands Racetrack located in nearby East Rutherford, New Jersey.

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[7] Petitioner's characterization of the alleged substance of petitioner's discussion with YRC officials and YRC's motivation behind the denial of racing and training privileges is a gross misstatement of fact. There is absolutely no evidence supporting petitioner's bald assertion that (1) he was not advised of the reasons of management's decision, (2) that management threatened to "black list" him from the racing industry in the event he did not withdraw his application for racing privileges, or (3) that management's decision was based upon the fact that petitioner testified on behalf of another harness race driver. Each of these allegations was rejected by both the Court of Appeals and District Court as being totally without factual foundation. (Petitioner's Appendix ("PA") 21a, 42a). Furthermore, petitioner has mischaracterized the substance of the District Court's decision in *Daigneault v. Yonkers Racing Corp.*, No. 89 Civ. 6725 (S.D.N.Y., 1989) (Goettel, J.). The District Court denied the plaintiff harness race driver's motion for a preliminary injunction but ordered that a due process hearing be conducted on the grounds that plaintiff was entitled to such a hearing under the terms of a stipulation of settlement previously entered into by the parties in a prior lawsuit. Following the conduct of said hearing, a written decision was issued by the hearing officer affirming YRC's denial of racing and training privileges to Daigneault.

SUMMARY OF ARGUMENT

As the private owner and operator of a New York harness racetrack, YRC has the common law and statutory right to decide who, among those licensed to drive, train and own harness racehorses by the state Racing Board, may participate in harness racing conducted at its racetrack so long as that decision is not based upon impermissible discriminatory grounds not applicable here.

In order to uphold the integrity of harness racing at Yonkers Raceway and maintain the confidence of the betting public essential to protect its multi-million dollar investment, YRC grants racing and training privileges only to those individuals it believes in its business judgment will foster honest, competitive harness racing.

Petitioner is a journeyman harness racehorse owner, driver and trainer of marginal ability and highly suspect integrity. Petitioner's state license was suspended on two separate occasions for serious violations of applicable state racing law, the most recent suspension arising from petitioner's involvement in a race fixing incident.

In excluding petitioner from its racetrack, YRC was exercising its common law and statutory right as the private owner and operator of Yonkers Raceway and did not, we submit, engage in "state action" for the purposes of 42 U.S.C. §1983.

The State of New York's extensive regulation of harness racing is insufficient to transform YRC's exclusion of

petitioner into "state action". Mere regulation, no matter how substantial, is not sufficient to transform a business decision of a privately owned and operated corporation into state action. The decision of the Court of Appeals to this effect is wholly consistent with both prior precedent of this Court, as well as every Circuit Court of Appeals which has considered the "symbiotic relationship"/"state action" issue in the context of privately owned and operated racetracks. For the foregoing reasons, Hadges' petition should be denied.

ARGUMENT

THE WRIT SHOULD BE DENIED

THERE ARE NO SPECIAL OR IMPORTANT REASONS FOR GRANTING THE WRIT SINCE THE SECOND CIRCUIT'S OPINION IS CONSISTENT WITH THE PRECEDENTS OF THIS COURT

Petitioner's state action argument is based solely upon the "symbiotic relationship" test enunciated in *Burton v. Wilmington Park Authority*, 365 U.S. 715, 725 (1961). Petitioner argues that New York State's extensive regulation of YRC's racing and wagering activity constitutes a symbiotic relationship between YRC and the State, thereby transforming into state action YRC's expulsion of petitioner from its racetrack.

Petitioner has seriously mischaracterized the nature of the state's regulation. While the state's regulation is concededly extensive, it does not extend to private management decisions involving, among other subjects, who

is to be permitted to participate in racing activities at the Raceway.

It has long been the common law of New York that an operator of a privately owned racetrack, such as YRC, has the absolute right to exclude any person from its racetrack without cause, so long as the exclusion is not based upon race, creed, color or national origin. *Madden v. Queens County Jockey Club, Inc.*, 296 N.Y. 249, *cert. denied*, 332 U.S. 761 (1947); *People v. Licata*, 28 N.Y.2d 113 (1971); *Presti v. New York Racing Association, Inc.*, 46 A.D.2d 387 (2d Dep't., 1975); *Vaintraub v. New York Racing Assoc., Inc.*, 28 A.D.2d 660 (1st Dep't., 1967); *Gottlieb v. Sullivan County Harness Racing Association*, 25 A.D.2d 798 (3d Dep't., 1966).

Upon the passage of the New York State Racing Law, this common law right was specifically recognized and codified in §4119.8 of Title 9 of the New York Code of Rules and Regulations, which states in pertinent part:

> *Nothing contained in this section shall diminish the right of any track to exclude any person as a patron or otherwise without reason provided such exclusion is not based upon race, creed or national origin."* (Emphasis added).

Accordingly, regardless of the extensive state regulation of racing activities at Yonkers Raceway, the right to determine who participates in those activities, among the hundreds of individual state license holders, has always been reserved to the private owners and operators of harness racetracks.

This makes perfect sense. YRC has invested over $65,000,000.00 in its racetrack. The success of that investment is directly related to the public's perception that the harness racing is honest and above board. Therefore, respondent must and does have the unfettered right to choose who, among the multitude of people licensed to own, drive and train harness racehorses, will be allowed to participate in racing at its racetrack. This decision is and should be based upon the particular individual's racing talent and integrity.

Petitioner is a journeyman of marginal ability. His past criminal record and recent state suspension from racing raise serious doubts about his integrity. The Raceway has an overabundance of capable and honest licensed owners, drivers and trainers who want to participate in harness racing at Yonkers Raceway. Quite simply, YRC neither needs nor wants petitioner's participation.[8]

The decision of the Second Circuit is wholly consistent with this Court's prior precedent. It is well settled that state regulation, though "extensive and detailed", is not sufficient to create a symbiotic relationship for state

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[8] YRC respectfully submits that petitioner's state license does not grant him an absolute, unqualified right to compete in harness racing at Yonkers Raceway. A state license merely represents that an individual is qualified to seek racing privileges at the various licensed racetracks. However, racetracks' need only a limited number of owners, trainers and drivers to conduct their racing activities. To hold that a state license constitutes an absolute right to race at every licensed track would force racetracks to accept every license holder, regardless of ability or integrity or the racetrack's need and/or capacity to do so.

action purposes. *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 350 (1974) (privately owned utility company subject to extensive state regulation and taxation not state actor); *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982) (extensive state regulation of privately owned nursing home insufficient to create state action). Petitioner's entire state action argument is based upon New York's regulation of YRC. However, in light of this Court's precedent, this is insufficient to create a "symbiotic relationship" necessary for a finding of state action under *Burton*.

Petitioner's reliance upon *Burton* is misplaced. This Court has expressly limited "the actual [Burton] holding to lessees of public property." *Jackson*, 419 U.S. at 358. Since YRC purchased and operates Yonkers Raceway with its private funds, *Burton* is inapplicable.

Moreover, we respectfully submit that the distinction between *Burton* and the instant matter is readily apparent. Unlike *Burton*, the state does not have a proprietary interest in the Raceway, which was purchased and is maintained by private, not public, dollars. The state does not have a neighboring, interrelated business present as in *Burton* and as such, lacks a direct financial stake in the Raceway's success. Finally, unlike the *Burton* restaurant, the Raceway does not enjoy the state's tax-exempt status. To the contrary, a substantial portion of the revenue generated by YRC from pari-mutuel racing activities is paid to the state in the form of taxation. Therefore, *Burton* is easily distinguishable.

The Second Circuit's decision is also in accord with every Circuit Court of Appeals which has considered this

issue. Each court has held that even extensive state regulation of privately owned and operated racetracks does not satisfy the symbiotic relationship test enunciated in *Burton*. *Bier v. Fleming*, 717 F.2d 308, 311 (6th Cir., 1983) *cert. denied*, 465 U.S. 1026 (1984); *Roberts v. Louisiana Downs, Inc.*, 742 F.2d 221, 225 (5th Cir. 1984); *Fitzgerald v. Mountain Laurel Racing, Inc.*, 607 F.2d 589, 596 (3d Cir. 1979) *cert. denied*, 446 U.S. 956 (1980); *Heflin v. Kentucky State Racing Comm.*, 701 F.2d 599 (6th Cir. 1983); *Fulton v. Hecht*, 545 F.2d 540, 542 (5th Cir.), *cert. denied*, 430 U.S. 984 (1977).

Petitioner's assertion that YRC merely exercised power delegated to it by the state in excluding him from Yonkers Raceway is a misstatement of law. As noted previously, the common law of the State of New York gives privately owned racetracks the absolute right to exclude any person from its racetrack without cause so long as the exclusion is not based upon impermissible grounds. In codifying the common law, the New York Legislature did not delegate this authority to private racetracks but rather, as recognized by the Court of Appeals, simply recognized this pre-existing common law right. (PA 19a). As such, in excluding petitioner, YRC was not exercising power delegated to it by the state as contemplated in *Jackson*, 419 U.S. at 352-353.

Finally, petitioner's state racing license has been restored and he is and has always been free to pursue racing opportunities at the other New York harness racetracks, as well as in New Jersey. His claim that the Raceway's refusal to grant him racing privileges constitutes a *de facto* revocation of his license is spurious. Petitioner's inability to obtain racing privileges elsewhere, if true, is a

reflection of others' independent recognition of his marginal ability and highly suspect integrity rather than a *de facto* revocation of his racing license.

CONCLUSION

Since the decision of the Second Circuit is wholly consistent with this Court's past precedent, as well as each Circuit Court which has considered the issue presented, there are no special or important reasons warranting the grant of the petition before the Court. Accordingly, respondent respectfully submits that the petition should be denied.

Dated: White Plains, New York
March 20, 1991

Respectfully submitted,

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